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Wilson Huhn

University of Akron School of Law, whuhn@uakron.edu

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THE FUTURE INTERPRETATION OF THE CONSTITUTION
AS A RESULT OF THE REELECTION OF PRESIDENT BARACK OBAMA

Wilson R. Huhn*

The Constitution is a law, a supreme and paramount law, a law that governs the government. It is also a written law, a document that serves as the starting point of all constitutional analysis. But as the great Chief Justice observed nearly two centuries ago it is not a prolix code¹ – it is instead merely a sketch of government drawn by our distant ancestors that each succeeding generation has embellished as our society develops and our values evolve.

Because the Constitution is what the Supreme Court says it is and because Presidents nominate the justices of the Supreme Court, presidential elections are in effect plebiscites about how the Constitution ought to be interpreted. By reelecting Barack Obama the American people have expressed their understanding of the fundamental principles our Constitution represents.

Upon the bench of the United States Supreme Court sit four deeply conservative justices, four rather liberal justices, and one justice who is sometimes quite conservative and sometimes quite liberal – a true “swing justice.” The four conservative justices and their ages are John Roberts (57), Samuel Alito (62), Clarence Thomas (64), and Antonin Scalia (78). The four liberals are Elena Kagan (52), Maria Sotomayor (58), Stephen Breyer (74), and Ruth Bader Ginsburg (79). The man in the middle is Anthony Kennedy (76).² In recent years many constitutional issues have been resolved by 5-4 votes with the deciding vote cast by Justice Kennedy.³

If Justice Breyer or Ginsburg retires then President Obama would fill each of their seats with other justices who are similarly liberal. In interpreting the Constitution the new liberal justices might utilize different reasoning and invoke different sources of authority. For example, future justices are unlikely to follow Justice Breyer’s freewheeling “cost-benefit” approach to constitutional decisionmaking.⁴ However, replacing one liberal justice with another would make relatively little difference in the results that the Supreme Court reaches.

On the other hand, if President Obama has the opportunity to replace either Justice Kennedy or one of the four reliably conservative justices with someone more liberal, then it would likely

* B.A. Yale University, 1972; J.D. Cornell Law School, 1977; C. Blake McDowell, Jr., Professor of Law, University of Akron School of Law.

¹ *McColloch v. Maryland*, 17 U.S. 316, 407 (1819) (Marshall, C.J.) (stating, “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”).

² See IIT Chicago-Kent College of Law, Oyez, *Roberts Court (2010-)*, at <http://www.oyez.org/courts/robt6>.

³ See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (overruling numerous previous decisions and striking down limitations on partisan campaign advertising by corporations).

⁴ See, e.g., *Alvarez v. United States*, 132 S.Ct. 2537, 2551 (2012) (Breyer, J., concurring in the judgment) (striking down Stolen Valor Act under the following standard: “Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.”).

result in dramatic changes over a broad spectrum of Constitutional law. Those changes are described below.

A. Elections and Voting

Because the right to vote is derivative of all other rights I begin my analysis of future Supreme Court decisions with election law.

A Supreme Court with one additional liberal justice would likely issue several rulings that would tend to equalize the power and influence of individual citizens in the democratic process.

1. The Supreme Court would likely uphold laws limiting the size of individual campaign contributions and prohibiting political contributions from unions and corporations. *Citizens United v. Federal Election Commission*,⁵ a 5-4 decision authored by Justice Kennedy, would be overruled.

2. A political party can effectively double its electoral strength by drawing legislative boundaries that concentrate or disperse the voters who support opposing parties. Although Justice Kennedy agrees with the liberal wing of the Court that political gerrymandering is a “justiciable” issue – that is, that the courts may review the constitutionality these schemes⁶ – he has so far refused to recognize or apply a standard for evaluating their constitutionality.⁷ Justice Kennedy has instead adopted a “do nothing” approach in response to obvious instances of political gerrymandering.⁸ The addition of one more liberal justice would likely lead the Court to find political gerrymandering to be a violation of the First Amendment, the Equal Protection Clause, or both.

3. In recent years “voter suppression” laws have become more common. In 2008 in *Crawford v. Marion County Election Board*⁹ the Supreme Court upheld a photo identification requirement for voters even though there is no evidence that “voter impersonation” is a significant problem. A slightly more liberal Supreme Court would be more likely to strike down arbitrary restrictions and unreasonable burdens on voting particularly if it appeared to the Court that the actual purpose of such measures was to make it more difficult for the poor, the disabled, or the elderly to vote.

These constitutional changes to American election law would be based upon three fundamental principles of democracy: all persons are created equal; all citizens have an equal right to participate in the political process; and the will of the majority must determine the result of elections.

⁵ 558 U.S. 310 (2010) (striking down limitations on partisan campaign advertising by corporations).

⁶ See *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (ruling that political gerrymandering presents a legal issue, not a political issue).

⁷ See *id.* at 306 *et seq.* (Kennedy, J., concurring in the judgment) (failing to establish a standard for evaluating claims of political gerrymandering); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (Kennedy, J.) (ruling that plaintiffs failed to state a sufficient claim of partisan gerrymandering).

⁸ See *id.*

⁹ 553 U.S. 181 (2008) (upholding photo ID requirements for voters). This case was decided by a vote of 6-3, with Justice Stevens joining Justice Kennedy and the four conservative justices in upholding the law. In 2010 Elena Kagan succeeded John Paul Stevens on the Court.

As a result of these changes it would be more difficult for wealthy individuals, corporations, unions, or a single political party to influence the outcome of elections. These changes would tend to equalize the influence of individual citizens on political campaigns and the electoral impact of each individual vote. As a consequence the policy preferences of the majority of citizens – the will of the people – would be more likely to be given expression and enacted into law.

B. Individual Rights and Equal Protection

A Court with one more liberal justice would more zealously guard individuals' right to privacy and more diligently protect historically oppressed minorities from the majority. The Constitution would not be used to protect historically powerful groups from legislation redressing social problems.

4. Justice Kennedy is aligned with the four conservative justices against the constitutionality of affirmative action programs.¹⁰ A more liberal Supreme Court would likely uphold affirmative action.¹¹

5. To date the Supreme Court has neglected to consider whether gays and lesbians are a “quasi-suspect class.”¹² A more liberal Supreme Court would be more likely to invoke heightened scrutiny in evaluating the constitutionality of laws that discriminate on the basis of sexual orientation.¹³ In addition, the Court might also recognize same-sex marriage to be a fundamental right, a question that Justices Kennedy expressly refrained from addressing in *Lawrence*.¹⁴

¹⁰ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down affirmative action admissions plan for University of Michigan); *Grutter v. Bollinger*, 539 U.S. 306, 388-395 (2003) (Justice Kennedy dissenting from the ruling of the Court upholding the affirmative action admissions plan of the University of Michigan Law School); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 782-798 (2007) (Justice Kennedy's opinion concurring with the majority striking down a school district's plan for racially integrating the public schools).

¹¹ See Mark Walsh, *High Court Tackles Affirmative Action Case: Conservative justices push advocates hard on race-based policy*, 10/17/12 Educ. Wk. 19 2012 WLNR 23009156 (reporting on oral argument in *Fisher v. University of Texas at Austin*, Case No. 11-345). The author stated that in order to overturn the affirmative action admissions program at the University of Texas:

the conservatives need the more centrist Justice Anthony M. Kennedy, who has never voted to uphold a racial preference in education, although he has endorsed the idea that racial diversity serves a compelling interest.

Justice Kennedy left much room for interpretation last week, but his questions did not give defenders of racial preferences much comfort.

¹² See *Romer v. Evans*, 517 U.S. 620 (1996) (utilizing rational basis test to strike down state constitutional amendment that deprived governmental units of the power to adopt laws forbidding discrimination on the basis of sexual orientation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (utilizing rational basis test to strike down state law criminalizing same-sex intercourse).

¹³ See, e.g., *Windsor v. United States*, ___ F.3d __ (2nd Cir. 2012) (finding gays and lesbians to be a quasi-suspect class and invoking intermediate scrutiny in evaluating the constitutionality of the federal Defense of Marriage Act).

¹⁴ See *Lawrence*, 539 U.S., at 578 (Kennedy, J.) (“The present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); *id.* at 585 (O'Connor, J., concurring in the judgment) (stating, “Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the

6. In 1992 in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁵ Justices O'Connor, Souter, and Kennedy acknowledged the personal challenges they faced (criticism, ostracism, and possibly violence)¹⁶ in reaffirming *Roe v. Wade*.¹⁷ In a 2004 case dealing with abortion protests Justice Kennedy signaled that he thought the liberal majority had failed to honor the “balance” the Court had struck in *Casey*.¹⁸ The vote of one more liberal justice would more reliably ensure a woman’s right to terminate an unwanted pregnancy.

7. Before Justice O'Connor left the Supreme Court, a majority of the Court repeatedly upheld laws and injunctions prohibiting abortion protesters from harassing patients and staff at abortion clinics.¹⁹ Justice Kennedy dissented from those decisions, and if such a case were to come back to the Court today it is likely that those anti-protest laws would be struck down. The addition of one more liberal justice would mean that these laws would continue to be upheld.

C. Separation of Church and State

The present Supreme Court justices embrace a variety of views about the meaning of the Establishment Clause. The liberal justices maintain that the Constitution demands that the government must be neutral with respect to religion – that the government may neither *endorse* nor *interfere* with religion.²⁰ Several of the conservative justices contend that the First Amendment prohibits the government from *coercing* individuals in matters of religion, but that the Constitution allows the government to *promote* religion.²¹ Justice Thomas maintains that the Establishment Clause is not even applicable against the States.²² If one more liberal justice were added to the Court it would cement a majority in support of the neutrality principle – the precept that the government must neither advance nor hinder religious exercise. The adoption of this principle would have the following effects:

asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).

¹⁵ 605 U.S. 833 (1992) (reaffirming *Roe v. Wade*).

¹⁶ See *id.* at 867 (O'Connor, Kennedy, and Souter, JJ.) (stating, “Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence.”).

¹⁷ 410 U.S. 113 (1973) (establishing a woman’s right to terminate her pregnancy prior to viability of the fetus).

¹⁸ See *Hill v. Colorado*, 530 U.S. 703, 791 (2000) (Kennedy, J., dissenting) (in response to decision of Court upholding a state statute limiting protests near health care clinics, stating, “The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*.”).

¹⁹ See *id.*; *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) (upholding some provisions of injunction limiting protests around abortion clinic, and striking down others). See also *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding municipal ordinance forbidding picketing targeting specific residences as applied to anti-abortion protestors).

²⁰ See, e.g., *McCreary County v. A.C.L.U. of Kentucky*, 545 U.S. 844, 860 (2005) (Souter, J.) (stating, “The touchstone for our analysis is the principle that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

²¹ See, e.g., *id.* at 908-909 (Scalia, J., dissenting) (stating, “The Court has in the past prohibited government actions that ‘proselytize or advance any one, or ... disparage any other, faith or belief,’ or that apply some level of coercion (though I and others have disagreed about the form that coercion must take)” (citation omitted)).

²² See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 693 (Thomas, J., concurring) (stating, “I have previously suggested that the Clause’s text and history “resis[t] incorporation” against the States.”).

8. It would be unconstitutional for the government to pay for children to receive a religious education. *Zelman v. Simmons-Harris*²³ would be overruled.

9. It would be unconstitutional for the government to transfer property or other funds, whether appropriated or not, to religious institutions. Cases such as *Valley Forge Christian College v. Americans United for Separation of Church and State*,²⁴ *Hein v. Freedom From Religion Foundation*,²⁵ and *Arizona Christian School Tuition Organization v. Winn*²⁶ would likely be overruled.

10. It would be unconstitutional for the government to place religious displays on public land in the absence of credible evidence that the display was historic or artistic in purpose and effect. *McCreary County v. A.C.L.U. of Kentucky*²⁷ would be reaffirmed and *Van Orden v. Perry*²⁸ would be overruled.

11. The prohibition on officially-promoted school prayer would be more firmly entrenched. Justice Kennedy opposes state-sponsored school prayer on the ground that it constitutes psychological coercion²⁹ – a liberal majority would oppose it because it constitutes governmental “endorsement” of religion.

D. Congress’s power to enact legislation would be expanded

The function of the law is to create enforceable rights. The purpose of the legal system is to redress invasions of those rights. In the absence of restraining law the rich and powerful do what they will with the poor and defenseless. As a general matter conservative forces usually oppose the adoption of new legislation, and in particular they oppose expansive readings of the power of Congress. The addition of one more liberal justice would most probably result in a broader interpretation of the Constitution’s various grants of power to Congress.

12. In *NFIB v. Sebelius* (2012)³⁰ five justices (the four dissenting justices and Chief Justice Roberts) found that neither the Commerce Clause nor the Necessary and Proper Clause conferred authority on Congress to enact the individual requirement to have health insurance.³¹ If one more

²³ 536 U.S. 639 (2002) (upholding state-funded voucher program for educational tuition for schoolchildren).

²⁴ 454 U.S. 464 (1982) (plaintiff lacked standing to challenge transfer of federal property to religious organization).

²⁵ 551 U.S. 587 (2007) (plaintiff lacked standing to challenge use of federal money to fund conferences to promote the President’s “faith-based initiatives”).

²⁶ 131 S.Ct. 1436 (2011) (taxpayers lacked standing to challenge state law granting dollar-for-dollar tax credits for private contributions to religious schools).

²⁷ 545 U.S. 844 (2005) (striking down a display of the Ten Commandments in a county courthouse)

²⁸ 545 U.S. 667 (2005) (upholding the erection of a large monument displaying the Ten Commandments outside the entrance of the Texas State Capitol).

²⁹ *Lee v. Weisman*, 506 U.S. 577, 588 (1992) (Kennedy, J.) (striking down officially-invited prayer at graduation, and stating, “subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.”).

³⁰ *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (upholding all but one provision of the Affordable Care Act).

³¹ *See id.* at 2584-2593 (Roberts, C.J.) (finding Congress lacked authority under the Commerce Clause to enact the individual mandate); *id.* at 2644-2650 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (same).

liberal justice ascended to the Court, this narrow reading of the Affection Doctrine would be overruled.

13. In the Affordable Care Act case the four dissenting justices would have ruled that Congress lacked the authority under the General Welfare Clause to enact two key provisions of the Affordable Care Act. In their opinion the individual mandate to purchase health insurance was not a tax³² and federal funding for the expansion of Medicaid was so vast that the states were in effect compelled to participate in the program, thus violating the federalism limits on conditional spending programs.³³ It was Chief Justice Roberts, joined by the four liberal justices, who provided the deciding vote upholding Congress's power to enact these laws pursuant to the General Welfare Clause.³⁴ The addition of one more liberal justice would quell doubts regarding Congress's power to enact tax or spending legislation under the General Welfare Clause.

14. Congress's power to enact legislation under the Enforcement Clauses of the 13th, 14th, and 15th Amendments would likely be expanded, thus permitting the enactment of new civil rights laws and preserving the constitutionality of existing laws like the 1965 Voting Rights Act.³⁵

³² See *id.* at 2650-2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (concluding that the individual mandate was not a "tax" within the meaning of the General Welfare Clause).

³³ See *id.* at 2656-2666 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (voting to strike down the expansion of Medicaid on the ground that no state could afford to turn down the offer of federal funding for the program).

³⁴ See *id.* at 2593-2601 (Roberts, J.) (upholding the individual mandate as an exercise of Congress's power to levy taxes); *id.* at 2601-2608 (Roberts, C.J.) (upholding Congress' expansion of Medicaid as a valid exercise of Congress' power to spend for the general welfare, but striking down the power to withhold funding for the existing Medicaid program for states that choose not to participate in the expansion of Medicaid). Chief Justice Roberts stated:

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

Id. at 2603.

³⁵ See, e.g., *Shelby County, Alabama v. Holder*, 679 F.3d 848 (2012) (upholding reauthorization of Voting Rights Act as valid enactment under Section 2 of Fifteenth Amendment). On November 9, 2012, the Supreme Court agreed to review this case on the following question:

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

E. The “state action doctrine” would be more broadly construed

The Constitution governs the actions of government officials and government agencies. It does not apply to the actions of individuals or private corporations unless those persons are exercising governmental powers – that is, unless those persons are engaged in “state action.” Conservative justices tend to apply a more narrow and rigid standard in evaluating whether or not a private person or company has engaged in state action.³⁶ A more liberal Supreme Court would more likely apply a “totality of the circumstances” test and would more often find “state action” to be present.³⁷ This has implications for a broad range of functions and services that have been “privatized” in recent decades.

15. The operation of private prisons,³⁸ charter schools,³⁹ and homeowners’ associations⁴⁰ would more likely be considered “state action,” making these institutions subject to constitutional guarantees such as due process, equal protection, and freedom of expression.

The State Action Doctrine extends the great moral principles of the Constitution (liberty, equality, and fairness) to situations where private interests enlist the power of the state to oppress others.

F. The Commercial Speech Doctrine

The addition of another liberal justice would not affect most freedom of expression cases. The present Supreme Court has vigorously defended the right to Freedom of Speech.⁴¹ However, in one branch of First Amendment law the addition of another liberal would make a significant difference. That is the area of “commercial speech.”

³⁶ See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 305 (2001) (Thomas, J.) (dissenting from the Court’s finding of state action on the ground that the conduct of the TSSAA did not fall within any previously established categories of state action).

³⁷ See *id.* at 298 (Souter, J.) (writing on behalf of the majority and finding state action to be present, stating “[T]he ‘necessarily fact-bound inquiry,’ leads to the conclusion of state action here.” (citation omitted)).

³⁸ See, e.g., Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 814 (2012) (stating, “Because private prisons fulfill the exclusively public function of incarceration, their incarcerative functions, like restricting prisoners’ freedoms and meting out punishment, constitute state action. But in a voucher system, their offer of religious services does not.”).

³⁹ See Catherine LoTempio, *It’s Time to try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435 (2012) (discussing case law applying the state action doctrine to charter schools).

⁴⁰ See Grant J. Levine, *This Is My Castle: On Balance, The Freedom of Contract Outweighs Classifying the Acts of Homeowners’ Associations as State Action*, 36 NOVA L. REV. 555 (2012) (contending that the rules and actions of private homeowners’ associations should not be considered state action).

⁴¹ See, e.g., *United States v. Alvarez*, 132 S.Ct. 1237 (2012) (striking down Stolen Valor Act which made it a crime for persons to lie about have earned military honors); *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (upholding right of Westboro Baptist Church to engage in offensive homophobic protest near funeral of marine killed in Iraq).

The doctrine of “commercial speech” is a subject where conservatives and liberals “switch sides.” Although liberals are generally more protective of political and religious dissenters than conservatives are, conservatives are generally more protective of businesses’ commercial speech than liberals are. Liberals are more likely to view laws regulating advertising, labeling, and data mining as ordinary “commercial legislation” and therefore subject these laws to a relatively low level of judicial scrutiny. Conservatives generally regard commercial speech as deserving of as much constitutional protection as political or religious speech, warranting strict scrutiny. The appointment of another liberal justice would likely mean that commercial speech would enjoy less constitutional protection. As a result:

16. Laws requiring the inclusion of warnings, nutritional content, or other information on the labels or advertising of commercial products would more likely be upheld. The Court would more likely reverse cases like the decision of the District Court in *R.J. Reynolds Tobacco Company v. F.D.A.* (2012);⁴² and,

17. Laws limiting or prohibiting the advertising of potentially harmful products or services such as tobacco, alcohol, or gambling would more likely be upheld. The Court would probably overrule *Lorillard Tobacco v. Reilly* (2001).⁴³

G. Preemption of state common law tort actions

Like Commercial Speech, Preemption is an area of Constitutional Law where liberals and conservatives take specific positions that seem to be at odds with their larger philosophical frameworks. As with Commercial Speech, in the field of Preemption economics seems to trump ideology. Normally conservatives champion “states’ rights” but in the Preemption cases the conservative justices take the position that many state common law tort actions are preempted by federal statutes. Similarly, liberals, who generally support the exercise of power by the federal government over that of the states, are far more reluctant than conservatives to find that state tort actions are preempted by federal law. Recently there have been a number of cases where cigarette manufacturers, pharmaceutical companies, and the manufacturers of medical devices have claimed that federal laws should be interpreted to prohibit individuals from suing companies for defective products or inadequate warnings. In some cases the Supreme Court has held that the plaintiffs’ cases could go forward,⁴⁴ but in several other cases the Court has ruled that the plaintiffs’ claims were barred by federal statutes imposing regulations on the companies.⁴⁵ Several of these cases have been 5-4 decisions.⁴⁶

⁴² 845 F.Supp. 2d 266 (2012) (striking down regulation requiring graphic images on cigarette packages warning of the dangers of smoking).

⁴³ 533 U.S. 525 (2001) (striking down state law restrictions on cigarette advertising in stores and on billboards).

⁴⁴ See, e.g. *Altria Group v. Good*, 555 U.S. 70 (2008) (federal law does not preempt state lawsuit based on tobacco company’s implied misrepresentation of safety of product); *Wyeth v. Levine*, 555 U.S. 555 (2009) (federal law does not preempt state lawsuit against drug manufacturer based on inadequacy of F.D.A.-approved warning label).

⁴⁵ See, e.g., *Riegel v. Medtronic*, 552 U.S. 312 (2008) (federal law preempts state lawsuit based on defective design of an F.D.A.-approved medical device).

⁴⁶ See, e.g., *Altria Group; Pliva, Inc. v. Mensing*, 131 S.Ct. 2567 (2011) (federal law preempts lawsuit based on generic drug company’s negligent failure to warn consumer of a danger associated with the drug).

18. Before invoking the Supremacy Clause in tort cases, liberal justices are likely to demand evidence in the legislative history to the effect that Congress intended to preempt state law causes of action. If one more liberal justice is added to the Supreme Court, the Court may no longer find that ambiguous federal statutes implicitly preempt such actions. Decisions precluding state tort actions such as *Cipollone v. Liggett Group* (1992)⁴⁷ and *Pliva, Inc. v. Mensing* (2011)⁴⁸ may be overruled.

H. State Sovereignty under the 11th Amendment

There has been a recent string of cases elevating “state sovereign immunity” to the level of a constitutional principle, thus preventing Congress from authorizing citizens to sue the states for money damages in certain circumstances. For example, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expenses Board* (1999)⁴⁹ the Court ruled that Congress does not have the power to authorize individuals to sue the states for money damages for trademark infringement. This principle of state sovereign immunity only applies to laws adopted pursuant to the original Constitution; the limitation does not apply to laws adopted pursuant to the 14th Amendment.⁵⁰ This has led to much litigation involving whether a particular law was adopted pursuant to powers such as the Commerce Clause (thus preventing Congress from authorizing citizens to sue the states for money damages) or whether it was adopted pursuant to the 14th Amendment (in which case Congress does have the power to authorize citizens to sue state governments for money damages). This has led to absurd results. In *Board of Trustees of University of Alabama v. Garrett* (2001)⁵¹ the Court ruled that state sovereign immunity precludes claims for employment discrimination brought under Title I of the federal Americans with Disabilities Act, but in *Tennessee v. Lane* (2004)⁵² the plaintiff was allowed to sue the state under Title II of the ADA. Similarly, in *Nevada Department of Human Resources v. Hibbs*⁵³ (2003) the Court permitted the plaintiff to sue the state for violating the Family Medical Leave Act when it refused him leave to care for his wife, but earlier this year in *Coleman v. Maryland Court of Appeals* (2012)⁵⁴ the Court ruled that the plaintiff did not have the right to sue the State

⁴⁷ 505 U.S. 504 (1992) (federal law preempts lawsuit based on tobacco company’s negligent failure to warn of dangers of tobacco).

⁴⁸ 131 S.Ct. 2567 (2011) (federal law preempts lawsuit based on generic drug company’s negligent failure to warn consumer of a danger associated with the drug).

⁴⁹ 527 U.S. 666 (1999) (state sovereign immunity precludes bank’s claim against state agency under federal Trademark Remedy Clarification Act).

⁵⁰ See, e.g., *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327, 1333 (2012) (stating, “Congress may abrogate the States’ immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment.”).

⁵¹ 531 U.S. 356 (2001) (state sovereignty immunity precludes claims for employment discrimination brought by disabled individual against the state university under Title I of the federal Americans with Disabilities Act).

⁵² 541 U.S. 509 (2004) (upholding validity of Title II of Americans with Disabilities Act as applied to State that failed to provide handicapped access to courtroom, and stating, “we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services”).

⁵³ 538 U.S. 721 (2003) (upholding provision of federal Family Medical Leave Act as properly enacted under § 5 of the 14th Amendment, and stating, “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.”).

⁵⁴ 132 S.Ct. 1327 (2012). In an opinion joined by three other justices, Justice Kennedy ruled that the remedy provided by the “self-care” provision of the FMLA was not “congruent with” or “proportionate to” any possible violation of the 14th Amendment by the state. Accordingly this provision of the FMLA was not a 14th Amendment enactment but rather a Commerce Clause measure, and the principle of state sovereignty barred recovery of money

for damages for refusing him sick leave under the FMLA. There are several other fundamental problems with this line of cases. First, the text of the 11th Amendment does not have anything to do with state sovereign immunity; instead, it constitutes a limitation on the jurisdiction of the federal courts.⁵⁵ Second, this line of cases inexplicably does not prohibit actions for injunctions; just actions for money damages.⁵⁶ Finally, the term “state sovereignty” was expressly mentioned in the Articles of Confederation⁵⁷ but was quite noticeably omitted from the Constitution of the United States, which instead established “a more perfect union.”⁵⁸ Almost all of the Court’s rulings in this area of the law have been 5-4 decisions.⁵⁹ The doctrine of “state sovereign immunity” is unsupported by either the history or the text of the Constitution; the differential treatment between suits for injunctions and those for money damages is arbitrary; and in practice the distinction between “Commerce Clause legislation” and “Fourteenth Amendment legislation” has proven unworkable.

19. If President Obama replaces one conservative justice with a liberal, the Supreme Court will probably overrule the entire recent line of 11th Amendment “state sovereign immunity” cases.

damages. Justice Thomas concurred on the ground that the *entire* FMLA is a Commerce Clause enactment and that therefore *all* lawsuits for money damages against state governments under the FMLA should be barred.

⁵⁵ U.S. CONST., amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

⁵⁶ *See, e.g., Coleman*, 132 S.Ct., at 1351 (stating, “An employee wrongly denied self-care leave, Maryland also acknowledges, may, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), seek injunctive relief against the responsible state official.”).

⁵⁷ ART. CONFED., art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

⁵⁸ U.S. CONST., pmbl.; *see also* U.S. CONST., amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁵⁹ *See, e.g., Coleman*, 132 S.Ct. 1351 (2012); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Florida Prepaid*, 527 U.S. 666 (1999).